

**APPENDIX**

Supreme Court, U. S.

**FILED**

**JAN 13 1977**

MICHAEL RODAK, JR., CLERK

**In the Supreme Court**  
**OF THE**  
**United States**

**OCTOBER TERM, 1976**

**No. 76-143**

**ROY SPLAWN, *Petitioner***

**VS.**

**PEOPLE OF THE STATE OF CALIFORNIA, *Respondent***

**On Writ of Certiorari to the Court of Appeal of the  
State of California, First Appellate District, Division Three**

**Petition for Certiorari Filed July 31, 1976**

**Certiorari Granted December 6, 1976**

APPENDIX

---

**In the Supreme Court**  
OF THE  
**United States**

---

OCTOBER TERM, 1976

---

No. 76-143

---

ROY SPLAWN, *Petitioner*

VS.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

---

On Writ of Certiorari to the Court of Appeal of the  
State of California, First Appellate District, Division Three

---

Petition for Certiorari Filed July 31, 1976

Certiorari Granted December 6, 1976

## Subject Index

---

	Pages
Docket entries .....	1
Information .....	22
Verdicts .....	25-28
Sentence and judgment .....	29
Notice on appeal .....	32
Opinion of court of appeal .....	33
Reporter's transcript .....	34

**DOCKET ENTRIES**

In the Superior Court of the State of California  
in and for the County of San Mateo

No. C 123

The People of the State of California,	} Plaintiff,
vs.	
Roy Splawn,	

**CLERK'S TRANSCRIPT**

Minutes Civil and Criminal, Department No. 10,  
Volume 199, Page 200

April 9, 1970—Each defendant was arraigned, through counsel was handed a copy of the Information, waived its reading and advice as to rights and waived time for trial. At request of defendants, time to plead continued to April 30, 1970, at 9:00 A.M. (or hearing on demurrer if one is filed).

All defendants on bail.

May 4, 1970—Each defendant entered a plea of not guilty to each count and waived time for trial.

Ordered that a Jury Trial be set for July 27, 1970, at 9:00 A.M. and a pre-trial conference be set for July 17, 1970, at 2:00 P.M.

Defendants' motions under Sec. 995 and 1538.5 P.C. set for June 17, 1970, at 2:00 P.M.

All defendants on bail.

July 13, 1970—Motion under Section 995.

June 7, 1971—The following named jurors who had been heretofore summoned, appeared and answered to their names: . . .

. . .

Defendants satisfied.

People satisfied.

1. Carl F. Spiess
2. Samuel T. Bentley
3. Alice O. Liehti
4. Robert A. Corrie
5. Anne G. Ward
6. Colin A. Cooke
7. Sandra J. Asher
8. Nanna B. Hetzner
9. Philip W. Mayo
10. Shirley Y. Carson

11. William E. Crowley

12. Otis A. Sturdivant, Jr.

The above twelve jurors were sworn that they would well and truly try the case now at issue before the Court and a true verdict render according to the evidence.

Alternate Juror James R. Brown was drawn from the Jury Box. . . .

Alternate Juror Hugh B. Hacke was sworn that he would well and truly try the case now at issue before the Court and a true verdict render according to the evidence.

11:15 A.M. . . . Opening statement to court and jury was made by H. Kelly Ogle, Deputy District Attorney.

Defendants reserved their rights to this time, as to their opening statement to Court and jury, until the People had rested their case.

11:25 A.M. Out of the presence of the jury, a motion to strike a portion of Count II of the Information, was made by Richard Chesney, attorney for Defendants Splawn. It is ordered that said motion be granted.

11:35 A.M. . . . The Clerk at this time read the Information to the jury.

Armand Richard Drivon was sworn and testified as a witness on behalf of the People. . . .

2:00 P.M. . . . Armand Richard Drivon was recalled to the stand and testified as a witness on behalf of the People.



People's Exhibit #3 (paper bag) was introduced into evidence.

2:25 P.M. Out of the presence of the jury, and Defendants waiving appearance, a motion to strike on behalf of the Defendants Splawn, was made by Richard Chesney, attorney for Defendants Splawn.

It is ordered that the motion to strike be denied.

A motion to strike all testimony of the witness Drivon was made by Richard Chesney, attorney for the Defendants Splawn. It is ordered that said motion be denied.

A motion for discovery pertaining to certain tapes was made by Richard Chesney, attorney for said defendants. It is ordered that said motion be granted—if said tapes are in existence.

A motion for dismissal on behalf of Defendants Splawn was made by Richard Chesney, attorney for the Defendants Splawn. It is ordered that said motion be denied.

2:45 P.M. . . . Armand Richard Drivon was recalled to the stand and testified on behalf of the People.

People's Exhibit #4 (41 colored photos) was introduced into evidence. . . .

3:32 P.M. . . . Armand Richard Drivon was recalled to the stand and testified as a witness on behalf of the People.

Police Sgt. Herbert G. Weiss was sworn and testified as a witness on behalf of the People.

People's Exhibits #1, #2 and #3, formerly introduced for identification only, now ordered into evidence.

4:15 P.M. . . . Out of the presence of the jury, a hearing was conducted at this time with the defendants and their counsel present in court.

Police Officer Richard Franklin Hamilton was sworn and testified as a witness on behalf of the People.

Defendants' Exhibit A-1 (Xerox copy of taped telephone call), A-2 (Xerox copy of taped telephone call) were introduced for identification only.

Margie E. Troy was sworn and testified as a witness on behalf of the People.

Defendants' Exhibits A-1 and A-2, formerly introduced for identification only now ordered into evidence.

A motion to dismiss the Information on behalf of the Defendants Splawn was denied.

People's Exhibits 5-A and 5-B formerly introduced for identification only, now ordered into evidence.

It is ordered that defendants remain out on present bail.

June 11, 1971— . . . 10:10 A.M. . . . Police Officer Austin Barber was sworn and testified as a wit-

ness on behalf of the People. People's Exhibit #6 (obscenity survey) was introduced for identification only. . . .

11:23 A.M. . . . Police Officer Austin Barber was recalled to the stand and testified as a witness on behalf of the People.

12:00 Court recessed, all jurors were admonished by the Court.

2:05 P.M. Court reconvened, stipulated that all jurors, defendants and their counsel were present in court.

Police Officer Austin Barber was recalled to the stand and testified as a witness on behalf of the People. . . .

3:24 P.M. . . . Austin Barber was recalled to the stand and testified as a witness on behalf of the People.

4:30 P.M. . . . It is ordered that the above entitled trial by jury be continued to June 14, 1971, at 9:30 A.M.

June 14, 1971—. . . 1:30 P.M. Court convened. . . .

Armand Drivon was called and testified on behalf of Plaintiff on cross-examination; Officer Drivon having been previously sworn. . . .

3:25 P. M. Court reconvened. It was stipulated that all jurors, alternate and defendants present.

Officer Drivon was recalled to the witness stand to testify further herein.

4:00 P.M. Witness excused.

Marie Tiernan was sworn and testified as a witness on behalf of the People.

People's Exhibits No. 7 (copies of documents re License of Golden Gate Book Store), No. 8 (photocopies of telephone record (bill), were admitted in evidence).

4:08 P.M. Witness excused. Court adjourned. . . .

Out of the presence of the jury, Court took up the admissibility of People's Exhibit No. 4 (colored photos). Argument on the same. People's Exhibit No. 4 is admitted.

4:23 Court adjourned.

June 15, 1971—. . . H. Kelly Ogle, Deputy District Attorney for the People Richard Chesney, Attorney for the Defendants Splawn William D. Esselstein, Attorney for Defendant Esselstein. It was stipulated that all jurors and alternate juror were present.

9:30 A.M. Court convened. All defendants present. . . .

The jury was excused in order for legal arguments on question asked by Mr. Ogle.

The jury was recalled to the courtroom. Counsel and defendants present.

Dr. John Peschau resumed testifying. . . .

11:17 A.M. Court reconvened. All jurors and alternate, counsel and defendants are present.

Dr. John Peschau resumed testifying.

12:00 Dr. Peschau was excused. The jury was executed and departed the courtroom for noon recess. Counsel, all defendants and court personnel remain. Mr. Chesney's motion to strike Dr. Peschau's testimony, in which Mr. Esselstein joined, was denied. . . .

2:04 P.M. . . . People rested.

Attorney Esselstein moved for acquittal, under Sec. 1118.1 PC, of defendant Esselstein, which was denied.

Mr. Chesney's motion for acquittal, under Sec. 1118.1 PC, of defendants Splawn, was denied.

2:17 PM Court recessed. 2:18 PM Court reconvened. All jurors, alternate, defendants and counsel present. Mr. Chesney waived opening statement. Mr. Esselstein made an opening statement to the court for defendant Esselstein.

2:23 PM Jimmy Brogden was called by Mr. Chesney, was sworn and testified.

Defendants' Exhibit B (blue carpet) was admitted in evidence. . . .

3:31 PM Jimmy Brogden resumed testifying.

4:03 Mr. Brogden was excused. . . .

June 16, 1971—. . . 9:36 AM . . . Vernie Walker was called by Mr. Chesney, was sworn and testified.

10:35 Mrs. Walker was excused. . . .

10:55 Court reconvened. All jurors, alternate, defendants and counsel are present.

Roy Splawn was sworn and testified in his own behalf.

11:43 Counsel and court personnel retired to chambers, out of presence and hearing of the jury, for argument. Jurors instructed to remain in place.

11:50 Counsel and court personnel returned to the courtroom, all jurors, alternate, defendants and counsel present.

Roy Splawn resumed testifying. . . .

2:04 PM Court reconvened. Roy Splawn resumed testifying.

2:30 PM Don Splawn was sworn and testified in his own behalf. . . .

3:32 PM Court reconvened. Don Splawn resumed testifying.

4:00 PM Robert Esselstein was sworn and testified in his own behalf.

4:38 PM Mr. Esselstein rested. The jury departed, after being admonished by the court. The further trial of this case is continued to 10 AM, June 18, 1971.

4:41 PM Outside the presence of the jury, all defendants and counsel present. At Mr. Chesney's motion, under Sec. 775 Evidence Code, Deputy \_\_\_\_\_ was ordered to be present (thru Mr. Ogle).

4:44 PM Mr. Esselstein's motion to acquit defendant Esselstein was denied.



4:45 PM Court recessed. All counsel shall be present at 8:30 AM, June 18, 1971, to review proposed instructions.

June 18, 1971—. . . H. Kelly Ogle, Deputy District Attorney, for the People Richard Chesney, attorney for the defendants Splawn William D. Esselstein, attorney for defendant Esselstein

10:53 AM The reporter and clerk joined the judge and all counsel in chambers, out of the hearing of the jury, where review of instructions had been taking place since earlier this morning. Statements were made by the court and counsel on the record with reference to the instructions. All counsel waived presence of defendants at this conference. Stipulated that the court may give instructions orally.

11:00 AM The in-chambers conference of court and counsel ended.

11:12 AM—Court convened. . . . Jerry Faulkner was called by Mr. Chesney, was sworn and testified.

11:55 Defendants' Exhibit C (piece of blue rug) was admitted. Mr. Chesney rested. Court recessed at 2 PM. All jurors admonished by the court.

2:07 PM Court reconvened. All jurors, alternate, defendants and counsel are again present. The People moved to dismiss charges against defendant Robert Esselstein.

2:09 PM The court instructed the jury to remain in their proper places. The judge, reporter, clerk and all counsel had an in-chambers conference out of hearing of the jury. Defense attorneys waive presence of defendants Splawn.

2:32 PM The Court, reporter, clerk and all attorneys re-entered the courtroom, all defendants, jurors and alternate are again present.

People's motion to dismiss for insufficient evidence charges against defendant Esselstein was granted and these charges are dismissed.

With the permission of the Court, Mr. Chesney re-opened his case.

2:34 PM Defendant Esselstein was called by Mr. Chesney and testified further.

2:41 Attorney William D. Esselstein was called by Mr. Chesney, was sworn and testified.

2:47 Mr. Chesney rested. Defendant and attorney Esselstein withdrew. Bail of defendant Esselstein exonerated.

2:48 PM Mr. Ogle made People's opening argument to Court and jury.

3:40 Court recessed. All jurors admonished by the Court.

4:00 PM Court reconvened. All jurors, alternate, defendants and counsel are present. Mr. Chesney made defendants' argument to Court and jury.

4:33 Court adjourned. The further trial of this case is contined to 9:00 A.M., June 21, 1971. All jurors admonished.

June 21, 1971—. . . H. Kelly Ogle, Deputy District Attorney for the People Richard Chesney, attorney for defendants Splawn.

9:19 AM Court convened. All jurors, alternate, defendants Splawn and counsel are present in their proper places. Mr. Chesney resumed argument to Court and Jury.

10:58 AM Court recessed to 11:15 AM. Jurors admonished.

All jurors having departed the courtroom, defendants and counsel present. A short discussion as to the remaining time elements in this case was had.

10:59 AM Court recessed.

11:20 AM Court reconvened. All jurors, alternate, defendants Splawn and counsel are present. Mr. Chesney resumed argument to court and jury.

11:34 AM Mr. Ogle made People's closing argument to Court and jury.

11:45 AM The Court orally gave instructions to the jury.

12:38 PM Deputy Sheriff (Bailiff) Kenneth Evans took charge of the jury after having been sworn to do so, and the jury retired for deliberation.

12:39 PM Counsel stipulated, and defendants agreed, that the alternate juror may leave under appropriate instructions of the Court and be on call. The alternate juror was admonished by the Court.

12:42 PM Stipulated the jury may go to and return from lunch without being brought into court.

4:45 The jury returned to the courtroom—all jurors (except the alternate juror) defendants Splawn and attorneys present. The court re-read requested instructions on entrapment. Tape Recording (People's Exhibit 5-B) was replayed to the jury; and counsel stipulated the reporter need not report this recording again. The reporter read requested testimony and the Court gave instructions requested.

6:10 PM The jury retired for further deliberation. Out of hearing and presence of the jury, defendants' attorney objected to the instructions.

6:30 PM The jury returned to the courtroom, all jurors, defendants and attorneys present. Court adjourned to 9:15 AM, June 22, 1971. All jurors admonished. Stipulated the jury may retire then to the jury room for deliberation without returning into court.

June 22, 1971—. . . 9:18 AM Pursuant to stipulation of June 21, 1971, all members of the jury are present and retired directly to the jury room for further deliberation in charge of Deputy Sheriff Kenneth Evans.

10:30 AM The jury returned to the courtroom, all jurors (except the alternate) defendants Splawn and attorneys present, replied in the affirmative thru the foreman to the Court's inquiry whether the jury had agreed upon verdicts, and rendered the following verdicts:

In the Superior Court of the State of California, in and for the County of San Mateo

The People of the State of California, Plaintiff, vs. Roy Splawn, Don Splawn and Robert Essenstein, Defendants, No. C 123

Verdict: We, the jury in the above entitled cause, find the defendant, Roy Splawn, not guilty of the crime of conspiracy, in violation of Section 182.1/311.2, Penal Code, California as charged in Count I of the Information Filed Herein.

Dated: 22 June, 1971, Samuel T. Bentley, Foreman.

\* \* \*

In the Superior Court of the State of California, in and for the County of San Mateo.

The People of the State of California, Plaintiff, vs. Roy Splawn, Don Splawn and Robert Essenstein, Defendants, No. C 123

Verdict: We, the jury in the above entitled cause, find the defendant, Don Splawn, not guilty of the crime of conspiracy, in violation of Section 182.1/311.2, Penal Code, California, as charged in Count I of the Information Filed Herein.

Dated: 22 June, 1971, Samuel T. Bentley, Foreman.

\* \* \*

In the Superior Court of the State of California, in and for the County of San Mateo

The People of the State of California, Plaintiff, vs. Roy Splawn, Don Splawn and Robert Essenstein, Defendants, No. C 123

Verdict: We, the jury in the above entitled cause, find the defendant, Roy Splawn, guilty of the crime of distributing obscene matter, in violation of Section 311.2, Penal Code, California, as charged in Count II of the Information Filed Herein.

Dated: 22 June 1971, Samuel T. Bentley, Foreman.

\* \* \*

In the Superior Court of the State of California, in and for the County of San Mateo

The People of the State of California, Plaintiff, vs. Roy Splawn, Don Splawn and Robert Essenstein, Defendants, No. C 123

Verdict: We, the jury in the above entitled cause, find the defendant, Don Splawn, not guilty of the crime of distributing obscene matter, in violation of Section 311.2 Penal Code, California, as charged in Count II of the Information Filed Herein.



Dated: 22 June 1971, Samuel T. Bentley, Foreman

\* \* \*

The court ordered the clerk to read and record the verdicts. The clerk read the verdicts to the jury and recorded them. On motion by Mr. Chesney, the jury was polled as to the guilty verdict against defendant Roy Splawn. Result: Yes-12 (unanimous).

10:37 AM The court thanked, excused and released from admonitions the jury.

Bail exonerated as to defendant Don Splawn. Roy Splawn, thru counsel, waived time for arraignment for judgment and formal arraignment for judgment, stated there is no legal cause why judgment should not be pronounced and moved for probation. Defendant waiving time, motion for probation and pronouncement of judgment is continued to July 23, 1971 at 9:00 AM in this Department. Later, the date of July 23, 1971, was changed to July 26, 1971, at the same time and place, with consent of counsel.

Roy Splawn may remain on bail.

1 Crim. No. 10,255  
In the Court of Appeal  
State of California

First Appellate District

Division Three

C 123 7-29-71 Conspiracy

People of the State of California,	}
Plaintiff and Respondent,	
vs.	
Roy Splawn,	
Defendant and Appellant.	

San Mateo County

Judge Honorable Gerald E. Ragan

Evelle J. Younger, Attorney General  
Assistant Deputy

Wells & Chesney, Inc.

By: Richard L. Chesney, Esq.  
2000 Center Street, Suite 310  
Berkeley, Calif. 94704

Nov 26 1971 Filed record on appeal, C1, R4

Jan 20 1972 Appellant notified pursuant to Rule 7a

Mar 1 1972 Filed appellant's opening brief



Jun 30 1972 Filed respondent's brief

Oct 17 1972 Cause argued and submitted

Jan 11 1973 Opinion: The judgment is affirmed.  
Brown (H. C.), J. We concur: Draper, P.J.,  
Caldecott, J. (W. P.)

Feb 16 1973 Petition for hearing filed in Supreme  
Court

Mar 8 1973 Petition for hearing denied in Supreme  
Court

Mar 13 1973 Remittitur to County Clerk

Feb 13 1974 Filed certified copy of Supreme Court  
order granting petition for writ of certiorari with  
directions.

Feb 14 1974 By the Court:  
The mandate of the United States Supreme  
Court having been received and filed, vacating  
the judgment of this court and remanding the  
cause to this court for further consideration, the  
remittitur heretofore issued March 13, 1973 is  
ordered recalled.

Feb 28 1974 Remittitur returned and cancelled

May 2 1974 Filed respondent's brief

May 10 1974 Filed appellant's opening brief

May 21 1974 Cause argued and submitted

Jul 29 1974 Filed stipulation vacating submission of  
cause.

Aug 1 1974 Filed order by the court pending further  
order of this court and ..... having so stipu-

lated order submitting cause for decision on  
5/21/74

Mar 29 1976 Filed order submitting cause

Mar 29 1976 Judgment offered. Brown (H.) J. We  
concur, ..... P. J. Caldecott, J. assigned  
Draper, (c.n.p.) See 10259

Apr 15, 1976 Filed petition for rehearing

Apr 28 1976 Filed order denying petition for re-  
hearing

Apr 29 1976 Petition for hearing filed in Supreme  
Court

May 26 1976 Petition for hearing denied in Su-  
preme Court

Jun 1 1976 Remittitur to County Clerk

1 Crim. No. 10,255 (Div. Three)

In the Supreme Court  
of the  
State of California

People, etc., Plaintiff and Respondent, vs. Roy Splawn, Defendant and Appellant.	}
--	---

County of San Mateo (C 123)  
Judge Gerald E. Ragan

Office of the Attorney General  
6000 State Bldg., S.F.  
Wells & Chesney, Inc.  
125-12th St., Suite 157  
Berkeley, Calif. 94607

1-11-73 J affirmed NP

Feb 16 1973 Filed Applt's petition for hearing (due  
3-12-73)

Mar 8 1973 Hearing denied

3-13-73 Remittitur issued

2-14-74 By the Court: The mandate of the United States Supreme Court having been received and filed, vacating the judgment of this court and remanding the cause to this court for further consideration, the remittitur heretofore issued March 13, 1973 is ordered recalled.

3-29-76 J affirmed NP

4-28-76 Reh'g denied

Apr 29 1976 Filed applt's petition for hearing (due  
5-28-76)

May 26 1976 Hearing denied

6-1-76 Remittitur issued

Supreme Court of the United States  
Office of the Clerk  
Washington, D.C. 20543

"The petition for a writ of certiorari is granted limited to Questions 1, 2, 3 and 4, presented by the petition."

Very truly yours,  
Michael Rodak, Jr., Clerk  
By June M. Hoffmann  
(Miss) June M. Hoffmann  
Assistant Clerk

## CLERK'S TRANSCRIPT

[5] Keith C. Sorenson, District Attorney  
County of San Mateo  
Hall of Justice & Records  
Redwood City, California  
Telephone: 369-1441

Filed  
April 3, 1970  
Marvin Church, County Clerk  
By /s/ Mary Bartlett  
Deputy Clerk

(E) (Indexed)

In the Superior Court of the State of California  
In and For the County of San Mateo

No. C 123

The People of the State of California, <div style="text-align: right;">Plaintiff,</div>	}
vs.	
Roy Splawn, Don Splawn and Robert Esselstein, <div style="text-align: right;">Defendants.</div>	

## INFORMATION

The District Attorney of the County of San Mateo hereby accuses Roy Splawn, Don Splawn and Robert Esselstein, and each of them, of the crime of felony, to wit: Violation of Section 182.1/311.2 of the Penal

Code of the State of California, and of the crime of misdemeanor, to wit: Violation of Section 311.2, Penal Code, State of California, as follows:

*Count I*—Violation of Section 182.1/311.2, Penal Code, California

That the said Roy Splawn, Don Splawn and Robert Esselstein, and each of them, on and between the 1st day of August, 1969, and the 7th day of November, 1969, at and in the County of San Mateo, State of California, did wilfully, unlawfully and feloniously commit the crime of conspiracy [6] in violation of Section 182 of the Penal Code of the State of California, and at the time and place last aforesaid, did conspire, combine, confederate and agree together to commit a crime, to wit: Violation of Section 311.2 of the Penal Code, State of California.

*First Overt Act*—That pursuant to the above conspiracy, combination and agreement, and to carry out the objectives thereof, the said defendant, Don Splawn, on or about August 1, 1969, on the premises known as the Golden Gate Book Store, 735 El Camino Real, Redwood City, offered to distribute to Armand Drivon motion picture films depicting heterosexual and homosexual activities.

*Second Overt Act*—That pursuant to the above conspiracy, combination and agreement, and to carry out the objectives thereof, the said defendant, Don Splawn, on or about November 5, 1969, in a telephone conversation with Armand Drivon agreed to meet at the aforementioned premises to discuss the purchase



of films by Armand Drivon of a type and character described in the first overt act.

*Third Overt Act*—That pursuant to the above conspiracy, combination and agreement, and to carry out the objectives thereof, Armand Drivon on or about November 5, 1969, on the aforementioned premises discussed with defendant, Don Splawn, the delivery of said films by defendant, Roy Splawn, to the aforementioned premises.

*Fourth Overt Act*—That pursuant to the above conspiracy, [7] combination and agreement, and to carry out the objectives thereof, the said defendant, Roy Splawn, on or about November 5, 1969, at the aforementioned premises, offered to sell said films on November 7, 1969, at the aforementioned premises to Armand Drivon and quoted the price of said films.

*Count II*—Violation of Section 311.2, Penal Code, California (Misdemeanor)

That the said Roy Splawn, Don Splawn and Robert Esselstein, and each of them, on or about November 7, 1969, at and in the County of San Mateo, State of California, did wilfully and unlawfully violate Penal Code Section 311.2, to wit: Distribute to Armand Drivon two reels of obscene 8 mm colored motion picture film depicting human beings in the act of sexual intercourse and acts of oral copulation.

Dated: April 3, 1970.

Keith C. Sorenson,  
District Attorney  
By /s/ Wilbur Johnson for  
John E. O'Leary, Deputy

# VERDICTS

[219] Filed  
June 22, 1971

Marvin Church, County Clerk  
By /s/ William G. Sitnek  
Deputy Clerk

(E)

In the Superior Court of the State of California  
In and For the County of San Mateo

No. C 123

The People of the State of California,  
Plaintiff,  
vs.

Roy Splawn, Don Splawn and  
Robert Esselstein,  
Defendants.

# VERDICT

We, the Jury in the Above Entitled Cause, find the defendant, Roy Splawn, Not Guilty of the crime of conspiracy, in violation of Section 182.1/311.2, Penal Code, California, as charged in Count I of the Information Filed Herein.

Dated: 22 June 1971

/s/ Samuel T. Bentley  
Foreman



[220] Filed  
June 22, 1971

Marvin Church, County Clerk  
By /s/ William G. Sitnek  
Deputy Clerk

(E)

In the Superior Court of the State of California  
In and For the County of San Mateo

\_\_\_\_\_  
No. C 123  
\_\_\_\_\_

<p>The People of the State of California, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>Roy Splawn, Don Splawn and Robert Esselstein, Defendants.</p>	}
--	---

### VERDICT

We, the Jury in the Above Entitled Cause, find the defendant, Roy Splawn, Guilty of the crime of distributing obscene matter, in violation of Section 311.2, Penal Code, California, as charged in Count II of the Information Filed Herein.

Dated: 22 June 1971

/s/ Samuel T. Bentley  
Foreman

[221] Filed  
June 22, 1971

Marvin Church, County Clerk  
By /s/ William G. Sitnek  
Deputy Clerk

(E)

In the Superior Court of the State of California  
in and for the County of San Mateo

\_\_\_\_\_  
No. C 123  
\_\_\_\_\_

<p>The People of the State of California, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>Roy Splawn, Don Splawn and Robert Esselstein, Defendants.</p>	}
--	---

### VERDICT

We, the Jury in the Above Entitled Cause, find the defendant, Don Splawn, Not Guilty of the crime of conspiracy, in violation of Section 182.1/311.2, Penal Code, California, as charged in Count I of the Information Filed Herein.

Dated: 22 June 1971

/s/ Samuel T. Bentley  
Foreman

[222] Filed

June 22, 1971

Marvin Church, County Clerk

By /s/ William G. Sitnek

Deputy Clerk

(E)

In the Superior Court of the State of California  
in and for the County of San Mateo

—  
No. C 123  
—

The People of the State of California,  
Plaintiff,

vs.

Roy Splawn, Don Splawn and  
Robert Esselstein,  
Defendants.

### VERDICT

We, the Jury in the Above Entitled Cause, find the defendant, Don Splawn, Not Guilty of the crime of distributing obscene matter, in violation of Section 311.2, Penal Code, California, as charged in Count II of the Information Filed Herein.

Dated: 22 June 1971

/s/ Samuel T. Bentley  
Foreman

### SENTENCE AND JUDGMENT

[223] Minutes Civil and Criminal, Department No. 12, Volume 212, Page 508

(Title of Court)

July 26, 1971

Present: Hon. Gerald E. Ragan, Judge  
John N. Thomas, Clerk  
Constantine Constant, CSR

(Title of Cause)

Report of Probation Officer, Motion for Probation and Time for Sentence.

H. Kelly Ogle, Deputy District Attorney for the People.

Richard Chesney, Attorney for the Defendant  
Defendant present in court with counsel.

The report of the Probation Officer was read by the court and ordered filed.

The defendant waived formal arraignment for judgment, and there being no legal cause to show why judgment should not be pronounced at this time, it is ordered that the motion for probation be denied. It is ordered that the defendant be sentenced to the County Jail for the period of ninety-one days (91), with one day jail sentence suspended, and it is further ordered that the defendant pay the fine in the sum of \$1,000.00 plus State assessment.

It is further ordered that a stay of execution be granted to the defendant to July 30, 1971 at 10 AM. It is further ordered that if an appeal is made, an appeal bond is hereby fixed at \$1,250.00.

Defendant to remain on present bail.

[224] Filed

August 11, 1971

Marvin Church, County Clerk

By /s/ Mary Bartlett

Deputy Clerk

(E)

In the Superior Court of the State of California  
in and for the County of San Mateo

No. C 123 Department 12 Present: Hon. Gerald  
E. Ragan

Date: July 26, 1971 Convicted of crime of Viol.  
Sec. 311.2, Penal Code, California (Misdemeanor)

People of the State of California,	}
vs.	
Roy Lee Splawn,	
	Plaintiff,
	Defendant.

### JUDGMENT AND COMMITMENT TO COUNTY JAIL

This cause came on regularly this day for judgment. The District Attorney, Keith C. Sorenson, by Deputy H. Kelly Ogle, with the said defendant, Roy Lee Splawn, and his counsel, Richard Chesney came into Court; and

The said defendant having been duly arraigned for judgment by the Court, and having been asked if he had any legal cause to show why judgment

should not be pronounced against defendant, to which defendant replied that he had none;

And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment:—

[225] That whereas said defendant has been convicted of the crime of Violation of Section 311.2, Penal Code, California: and whereas defendant has refused probation:—

It Is Therefore Ordered, Adjudged and Decreed that the said defendant be and he is hereby sentenced to serve ninety-one (91) days in the County Jail, with one day suspended, and pay a fine in the sum of \$1,000.00 plus \$250.00 penalty assessment, the execution of this sentence is stayed to July 30, 1971, at the hour of 10:00 A.M. Defendant is admitted to bail on appeal in the amount of \$1,000.00 plus \$250.00 penalty assessment. In the event said bail is posted, execution of the sentence is stayed pending of determination on appeal.

Further, This Is To Command You, the Sheriff of the County of San Mateo, to take and safely keep and imprison defendant in said County Jail for the term of

Ninety-One (91) Days, with One (1) Day Thereof Suspended.

The said Defendant was then remanded to the custody of the Sheriff.

[227] (Title of Court and Cause)

(E)

(Endorsed)

Filed

July 29, 1971

Marvin Church, County Clerk

By /s/ Sara Bradley

Deputy Clerk

### NOTICE OF APPEAL

To the Clerk of the above-entitled Court:

The Defendant Roy Splawn appeals from the Judgment entered in this matter on July 26, 1971.

Dated: 7/28/71

Wells & Chesney, Inc.

By /s/ Richard L. Chesney,

Richard L. Chesney, Esq.

### OPINION OF COURT OF APPEAL

The opinion of the California Court of Appeal of March 29, 1976 is contained in Appendix A of the Petition for Certiorari.

The denial of the Petition for Hearing in the California Supreme Court is contained in Appendix B of the Petition for Certiorari.



# REPORTER'S TRANSCRIPT

## Instructions relative to obscenity

[878] . . . California Penal Code Section 311.2 provides that every person who knowing'y distributes or sells obscene matter to others is guilty of a misdemeanor. Matter within the meaning of this statute includes movies or films.

In the crime charged in count two of the information, violation of Penal Code Section 311.2, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, such as knowingly distribute obscene motion pictures to others, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful.

The word "knowingly" as used in the context of Penal Code Section 311.2, means that each of the defendants must have known the contents of the material, and must have been in some manner aware of its obscene character. It is not necessary to construe "knowledge that the matter is obscene" as meaning that each of the defendants knew that a Court would decide the matter to be legally obscene, nor is it direct evidence that each of the defendants has personally viewed the films in question necessary for knowledge let me repeat that. Nor is—when I say "let me repeat it, I got the emphasis in the wrong place here, the punctuation."

[879] Nor is direct evidence that each of the defendants has personally viewed the films in question necessary, for knowledge may be established by circumstantial evidence.

The word "distribute" means the transfer of possession of obscene matter whether or not it was purchased or paid for with money or with some other form of consideration.

As used in these instructions, "obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in description or representation of such matters, and is matter which taken as a whole is utterly without redeeming social importance.

Thus, for the matter to be obscene, each of the three following factors must be found to exist beyond a reasonable doubt:

1. It is matter taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to the prurient interest, that is, the shameful or morbid interest in nudity, sex, or excretion; and
2. It is matter which taken as a whole goes substantially beyond the customary limits of candor in description or representation of such matter; and
3. It is matter which taken as a whole is utterly without redeeming social importance.

The average person is, of course, a hypothetical person. [880] The phrase means a person with an average interest in and attitude toward sex; not a libertine and not a prude, not a person who is pre-occupied with sex and not a person who rarely if ever thinks about sex; not a person who thinks sex is the most important thing to be discussed and not a person who thinks sex should never be discussed. The phrase means a normal individual of average sex instincts; not one who is undersexed, not one who thinks sex is the most important factor in life, and not one who is afraid of sex or ignorant of sex or bored by sex. In short, the phrase "average person" means a normal, healthy, average adult man or woman with normal, healthy, average attitudes, instincts and interests concerning sex.

The contemporary standard to which the law makes reference is set by what is, in fact, acceptable to the community as a whole, not by what some person or persons may believe the community as a whole ought to accept. Ascertainment of the standard must be based upon an objective determination of what affronts and is unacceptable to the community as a whole. It must not be based upon a merely subjective reflection of the tastes or the moral outlook of the individual jurors.

You are instructed that for purposes of determining the obscenity of the material here in question, the relevant community is the entire State of California.

In determining whether a particular matter affronts contemporary community standards relating to the description or representation of sex, you may take into account the nature of the particular form of expression involved. For example, a motion picture [881] depicting sexual scenes may transcend contemporary community standards before a frank description of the same scene in written words would.

A "prurient interest" is an interest in sex, nudity or excretion, and in matters concerning sex, nudity or excretion which is either shameful, morbid, unhealthy or unwholesome. A book, magazine, film or similar matter which appeals or panders to an interest in sex, nudity or excretion, that can be described by any of those adjectives, appeals to prurient interest.

This does not mean that material can be said to appeal to prurient interest merely because it describes an activity of which you disapprove or which you believe to be sinful, such as adultery. It is not the activity that the material describes or depicts, but the manner in which it describes or depicts it that determines whether the material is prurient. If the material is calculated by the physical actions that it describes and the detail and character of the depictions that it contains to appeal and excite in the reader shameful, morbid, unhealthy or unwholesome interests, thoughts or desires concerning sex, nudity or excretion, you can find that it appeals to prurient interest.



"Morbid" as used in these instructions, means sick, unhealthy or unwholesome.

"Substantially" means in a way having substance, that is, in a significant or material or essential respect rather than in a merely formal or minimal imaginary way.

The definition of "utterly" is as follows: To an absolute [882] or extreme degree; to the full extent; absolutely, altogether, entirely, fully, thoroughly, totally.

The word "redeeming" refers not to a balancing of the pruriency against the social importance of the material, but rather to the presence of matters of social importance in the content which will recover for the material its position as Constitutionally protected utterance.

In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled in a matter for you, the Jury, to determine.

The United States Supreme Court has ruled that obscenity is not protected by the first amendment to the United States Constitution and may be prosecuted.

Sex is not synonymous with obscenity. However, you may consider the circumstances and the manner in which they are or may be portrayed as you weigh the matter under the definition of obscenity which I have given to you.

Evidence that matter allegedly similar and comparable to that presently in question is openly exhibited in the community may [883] be considered by the Jury for such bearing, if any, as it may have on the questions of customary limits of candor and contemporary community standards. The weight of such evidence is entitled is a matter for the Jury to determine in light of all the circumstances, including, but not limited to, whether the allegedly similar and comparable matter is in fact similar and comparable to the matter which is the subject of the present charge and whether such allegedly similar and comparable matter enjoys substantial community acceptance. Availability and accessibility may or may not, depending on all the circumstances, indicate acceptability to contemporary community standards.

The fact, if it be a fact, that the films in question were not distributed to minors or to unwilling adults, shall not be considered by you in arriving at the guilt or innocence of the defendants.

Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance.

If the object of work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered as evidence that the work is obscene.

The Court has charged you that one ingredient of [884] "obscenity" is the appeal of the material to prurient interest. "Prurient" is a word that may mean different things to different persons.

Under the law herein, a prurient interest is a shameful or morbid interest in sex or nudity as distinguished from a candid and normal interest in sex or nudity. Material does not appeal to a prurient interest if the average person can view the material candidly, openly and with the normal interest in sex which all persons presumably have in greater or lesser degree.

Contemporary community standards are set by what is in fact generally available and accepted in the community as a whole and not by what some persons or groups of persons may believe the community as a whole ought to accept or reject, because the determination of contemporary community standards must be objective rather than subjective.

In determining whether the matter goes substantially beyond customary limits of candor, measured contemporary community standards, you may consider what is going on in the community, not necessarily what ought to be going on. In this regard you may consider what is generally available in book stores, motion picture theaters, bars, archives, night clubs,

and all other forms of communication in the community. You are to consider not only what kinds of books, magazines, films and live entertainment exist in the community, but also the circumstances of dissemination.

"Sex" and "obscenity" are not synonymous. The portrayal of sex is not in itself a violation of the statute. Sex is one of [885] the vital problems of human interest and public concern.

The freedom of speech and the press guaranteed by the Constitution embraces the liberty to discuss publicly and candidly all matters of public concern, including sex.

The question of whether the matter is utterly without redeeming social importance is not to be judged with reference to the average person. The matter may have redeeming social importance even though it is beyond the understanding of the average man and embraced by the morals of the day. This is because all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees of the first amendment.

A film has social importance if it has the capacity to broaden man's range of sympathies or consciousness, or to enable him to see, hear or appreciate what he might have otherwise missed, or deepens his emotions, or makes life seem richer, more interesting or more comprehensible, or offers entertainment or provides information or insights into man's relationship



to the society in which he lives. A film may have social importance if it appears worthless to the average person or to most people.

The statute herein requires proof, in addition to knowledge of obscenity, of a specific intent to appeal to the prurient interest of the average person who may view the films involved herein. Unless such specific intent is established beyond a reasonable doubt as to the defendants, the defendants must be found not guilty.

[886] The mere fact that a film depicts sexual activity, masturbation, male or female genitalia, bare buttocks or pubic hair is insufficient in and of itself to condemn such film as obscene in law and to deny such film the Constitutional protection of freedom of speech and press.

Knowledge of the alleged obscenity of the films here cannot be inferred merely from the fact, if you find it to be a fact, that any defendant sold the films.

A film may not be deemed obscene unless it is utterly without redeeming social importance. Under the law, the word "utterly" has been defined as follows: To an absolute or extreme degree; to the full extent; absolutely; altogether; entirely; fully; thoroughly; totally. In other words, the Constitution protects all material relating to sex except that which is totally devoid of any social importance.

The word "redeeming" refers not to a balancing of the alleged pruriency against the social importance, but rather to the presence of matters of social importance in the content of the material taken as a

whole which gains for the material a position of Constitutionally protected speech. The Jury will, therefore, keep in mind that in addition to the standards for judging obscenity heretofore defined no film can be found to be obscene unless the film is utterly without redeeming social importance as the Court has defined.

Your own personal and social views of material such as that charged in the information may not be considered. Thus, [887] whether you believe that the material is good or bad is of no concern; so too you may not consider whether in your opinion the material is moral or immoral; whether it is likely to be helpful to or injurious to the public morals. Similarly, whether you like or dislike the material, whether it offends or shocks you, may not be considered by you. You may think the material is immoral, shocking or offensive, and yet you must acquit the defendant if the material is not obscene as the Court has defined that term for you.

The mere private possession of obscene material is not a criminal offense.